THE NEW TRUST LEGISLATION

Trade Commission Act
Federal Anti Trust Act

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THE TRADE COMMISSION ACT[1]

On January 20, 1914, at a joint session of both Houses of Congress, President Wilson read his long-awaited message upon the subject of trust legislation. The views therein expressed forecast admirably the character of the measures which were to constitute the anti-trust program of the present administration. The drafts of five tentative bills designed to effect the reforms suggested by the President were made public almost immediately afterwards. These bills provided:

(1) For the creation of an Interstate Trade Commission of five members with investigatory powers into the organization and operation of corporations engaged in interstate commerce, excepting carriers. The commission was also empowered to act as an advisory board: to the Attorney General, in terminating by agreement or by suit unlawful conduct or conditions; and to the courts, when these at discretion referred to it any aspect of a litigation or any proposed decree. In addition it was given the function of assisting the government in preventing violations of the Sherman act by submitting information in regard thereto to the Attorney General.

(2) For the prohibition of interlocking directorates in interstate corporations, railroads, and banks and trust companies which are members of a reserve bank.

(3) For a definition and explanation of various terms and expressions used in the Sherman anti-trust act.

(4) For amending the Sherman act by declaring (a) that both local price cutting with the intent of destroying competition and exclusive purchasing and selling arrangements were to be regarded as attempts to monopolize.

(b) That a decree obtained by the government should be conclusive evidence of the same facts and issues of law in favor of any other party in any other proceeding brought under the provisions of the act.

(c) For injunctive relief against threatened loss or damage by reason of a violation of the act.

(5) For giving to the Interstate Commerce Commission the power to regulate the issuance of railway securities.[2]

The Trade Commission bill (H.R. 12120) was the only one to be introduced into Congress at this particular time. This measure was modeled along the lines of what was commonly known as the Newlands bill introduced into the Senate several months previously. Although containing several amendments and additions it pre-

[1] This is the first of two articles on recent trust legislation. The second, to be published in the March number, will be devoted to the Clayton act.

[2] *Cf.* H.R. 12120, and Committee Prints 1, 2, 3, 4, tentative bills, and *Financial Chronicle*, vol. 98, p. 273 ff.

served the essential features of the earlier measure.[3] The new bill was introduced in the House by Representative Clayton and referred to the Committee on Interstate Commerce. Simultaneously it was also introduced in the Senate by Senator Newlands as S. 4160.[4]

A few days after the tentative bills were made public,[5] hearings upon them were begun. Representative Adamson's Committee on Interstate and Foreign Commerce took charge of the Interstate Trade Commission and Railroad Securities measures. Representative Clayton's Committee on the Judiciary assumed control of the three remaining bills. The two series of hearings continued for some weeks.[6]

[3] *Cf.* statements of Representative Clayton and Senator Newlands to the press, quoted in *Cong. Rec.,* vol. 51, p. 2,203.

[4] *Ibid.,* pp. 2,203, 2,212, 2,341.

[5] Tentative bill no. 4 prohibiting intercorporate stockholding does not appear to have been made public along with the other bills at this time.

[6] The course of the Railroad Securities bill it is not necessary to trace. This measure, after having undergone several changes, finally passed the House and was referred to the Senate Committee on Interstate Commerce, from which it was reported back with amendments by Senator Newlands on July 23. Some pressure, however, had been brought to bear in part because of the European war, and early in September it was announced that in view of the disturbed conditions created by this event the President had consented to the postponement of the securities measure for at least the session (*Cf. New York Times,* September, 3, and *Chronicle,* vol. 99, p. 647).

The legislative history of the Trade Commission bill is summarized as follows:

On March 14 a newly drafted bill for the creation of an Interstate Trade Commission (H.R. 14631) was introduced into the House by Representative J. Harry Covington of Maryland and was referred to the Committee on Interstate and Foreign Commerce (*Cong. Rec.,* vol. 51, p. 5,218). This bill was reported to embody the ideas of President Wilson (*Chronicle,* vol. 98, p. 878) and represented the unanimous views of a subcommittee (Covington, Sims, Rayburn, Montague, Talcott, Stevens of Minnesota, Esch, and Knowland) of the House Interstate Commerce Committee, which had been appointed by Chairman William C. Adamson on February 16. Representative Covington was chairman of this subcommittee. One month later this gentleman introduced a revised draft (H.R. 15613) of his bill of March 14 (H.R. 14631, *Cong. Rec.,* vol. 51, p. 7,178). On the succeeding day, April 14, this bill was reported with amendment by Mr. Covington accompanied by a report (H. Rept. No. 533, 63 Cong., 2 Sess.). The bill and report were then referred to the Committee of the Whole House on the state of the Union (*Cong. Rec.,* vol. 51, p. 7,244). The revised bill differed but little from the Covington measure introduced one month previously. The principal change was contained in an amending clause providing that in any equity suit brought at the instance of

the Attorney General under the anti-trust acts the court might, on conclusion of the testimony, refer the suit to the Trade Commission to ascertain and report an appropriate form of decree, and that upon such report exceptions might be filed. The court might then adopt or reject the report thus presented either in whole or in part.

On June 5, in practically unchanged form, the Interstate Trade Commission bill (H.R. 15613) passed the House by a vive voce vote after a motion by Representative Murdock to recommit had been lost by a vote of 151 to 19 (*Cong. Rec.*, vol. 51, pp. 10,743-10,745). As earlier indicated, the original Trade Commission bill, known in the House as H.R. 12120, was also introduced in the Senate by Senator Newlands (S. 4160). This measure was referred to the Senate Committee on Interstate Commerce (p. 2,341). On June 6 this bill was reported back by Senator Newlands so amended as to constitute really a substitute measure (pp. 10,771-72). The bill was accompanied by a report (No. 583) thereon. The same day the Senate received the House Interstate Trade Commission bill (H.R. 15613) which measure was also referred to the Senate Committee on Interstate Commerce (p. 10,770). A week later Senator Newlands reported back this bill and submitted a report (No. 597). His committee had so amended the measure originally passed by the House on June 5, that to all practical intents and purposes the amended Senate Trade Commission bill (S. 4160) was substituted for it. An important amendment, however, not appearing in the amended bill (S. 4160), was added by the Senate committee in giving to the Trade Commission jurisdiction over unfair competition (Sec. 5, H.R. 15613, reported by Mr. Newlands with amendments, June 13, 1914. *Cf.* also Senator Newlands' remarks, *Cong. Rec.*, vol. 51, p. 11,274). On June 20 Senator Newlands moved that the Senate Trade Commission bill (S. 4160) be stricken from the calendar and that H.R. 15613 be substituted for it (p. 11,726). This was agreed to.

After a rather protracted debate in the Senate, largely concerning the matter of unfair competition, a unanimous consent was reached that a vote on the Trade Commission bill should be taken not later than 6 p. m. on August 5 (p. 14,461). On that day, after some debate and the rejection of several amendments, H.R. 15613 as amended by the Senate passed by a vote of 53 to 16, 27 not voting (p. 14,497). Two days later the House by unanimous consent disagreed to H.R. 15613 as amended, and asked for a conference (p. 14,618). In the Senate Mr. Newlands on the same day moved that the Senate agree to the conference, the Senate conferees to be named by the Chair. The motion was agreed to and the Vice-President appointed Senators Newlands, Pomerene, Saulsbury, Clapp, and Cummins (p. 14,612). For the House the Speaker named Messrs. Adamson, Sims, Covington, Stevens (Minn.), and Esch (p. 14,618). The bill remained in the hands of this conference committee for about a month until the conference succeeded in drafting a measure embodying the essential features of both the House and Senate proposals. On September 4 Mr. Adamson in the House and Mr. Newlands in the Senate presented the conference report, including the draft of the bill in its final form (pp. 16,081, 16,124). On September 8 the Senate, by a vote of 43 to 5, agreed to the conference report, and two days later the House also accepted it (pp. 16,181, 16,325). The measure was presented to the President on September 15 (p. 16,582) and was signed by him on September 26.

Character and constitution of the commission. As passed and signed by the President, the Federal Trade Commission bill provides for a commission of five members, not more than three of whom shall be members of the same political party. The terms of the first commissioners are three, four, five, six, and seven years respectively. Each of their successors is appointed for seven years except that a person selected to fill the unexpired term of a commissioner is appointed only for the balance of that term. The salaries of the commissioners are $10,000 and a secretary is provided for at a salary of $5,000.[7]

With the organization of the commission, the bill provides that the Bureau of Corporations shall cease to exist, together with the offices of commissioner and deputy commissioner. All pending investigations of the bureau are to be continued by the commission, to which all employees are transferred. The bureau's records also become the property of the commission and unexpended funds become available for its use.[8]

Powers of the Commission.[9] These may be summarized as follows:

(1) Power to effect a readjustment of business and prescribe appropriate decrees in equity suits;
(2) Power of investigation;
(3) Power to require reports and classify corporations;
(4) Power over unfair competition.

(1) As originally passed by the House on June 5, the Trade Commission bill provided for an investigatory tribunal with little or no power beyond that which is the necessary accompaniment of investigation. This fact also remains true in large measure of both the amended bill as passed by the Senate and of the bill finally adopted in conference passed by both houses and signed by the President. If either measure be stripped of the section relating to unfair competition little remains but provision for an investigatory body. In addition to its function of investigation,

[7] Secs. 1 and 2 H. R. 15613, as amended in conference. References in the discussion of the Trade Commission, except where otherwise indicated, refer to this measure.

[8] Sec. 3.

[9] By the terms of the Clayton bill the commission is given certain other powers besides those mentioned in the measure creating it. It has been deemed best, however to consider these in connection with the Clayton bill rather than under the discussion of the Trade Commission bill. But one should not arrive at a final conclusion with regard to the powers of the Trade Commission without considering the authority bestowed upon it under the Clayton bill.

of which more later, the new law does provide, however, that *upon the application of the Attorney General* the commission may "investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."[10] The power of the commission to make these recommendations, therefore, depends upon the application of the Attorney General. That official is not bound to ask the commission for these recommendations nor, furthermore, is there apparently anything in the act which binds him to the acceptance of such recommendations when once they have been made.[11] While it was probably the intention of Congress that the Attorney General should rely upon the commission for recommendations and that he should adopt such as are made, even a casual critic of the bill will wonder why the law did not make it obligatory upon that officer to do both. Certainly it is only reasonable to suppose that the commission will be much better equipped than the Attorney General to devise an economically satisfactory adjustment. Why then make this function in any way dependent upon the latter?

The new bill also provides that "in any suit in equity brought by or under the direction of the Attorney General . . . the court *may* . . . if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein."[12] But, it is not necessary that the courts should do this and the court "may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."[13]

Again, it was probably the intention of Congress that the courts should consult the commission in the matter of decrees. Furthermore, it is extremely probable that they will do so. Yet it remains discretionary with them. They need not do so unless they wish. Would not the law have been improved by providing that in each case the courts *must* submit the suit to the commission as a master in chancery to report an appropriate form of decree? Under our theory of separation of powers the courts

[10] Sec. 6(e).

[11] Obviously the discretion of the Attorney General is subject to the instructions of the President.

[12] Sec. 7. Italics are the writer's.

[13] *Ibid.*

could not be required to adopt the conclusions thus arrived at. On the other hand, the requirement that the court must submit the case to the commission and receive from it a report of an appropriate form of decree would appear to the writer to be procedural in character and therefore constitutional. Certainly it is as yet by no means settled law that such an arrangement would be unconstitutional.

Since they are in no way mandatory upon either the Attorney General or the courts the two provisions under discussion can be of advantage only through the fact that either or both the Attorney General and the courts elect to call upon the commission for assistance. Assuming, as it is probably reasonable to do, that both pursue such a course, it is necessary to point out that there is still room for one to question whether any positive advantage has been secured by the power conferred upon the commission by these two clauses. It should not be forgotten that in the Bureau of Corporations the Department of Justice has had in the past an agent capable of performing such functions when called upon. While this service was *extra*-official in character, the fact remains that the bureau rendered it at least once during Mr. Wickersham's incumbency and that, to quote his language regarding the services of the bureau in the Tobacco dissolution, "the report of its principal expert was largely relied upon . . . in accepting as economically satisfactory the distribution of businesses under the plan.[14] Furthermore, the functions of the Bureau of Corporations in these matters, as also suggested in Mr. Wickersham's report might easily have been extended, thus securing the desired results without creating any Trade Commission.

At the same time, one should not underestimate the importance of these two powers which have been conferred upon the commission. The Bureau of Corporations was not specifically authorized to assist either the Attorney General or the courts. The commission is. Moreover, much more weight will attach to the conclusions of such a body than could possibly attach to those of the bureau. If the commission is composed, as it is hoped that it will be, of men thoroughly familiar with economic conditions and affairs, it is more than likely that its functions of assisting the Attorney General and the courts will have valuable results. This effect is contingent upon the assumption that the Attorney General and the courts make use of the commission.

[14] *Report of Attorney General,* 1911, p. 7.

(2) Aside from the power of investigation which is conferred upon the commission as incidental to the functions just discussed, that body is given several other inquisitorial powers. The commission has power:

A. To gather and compile information concerning, and to investigate from time to time the organization, etc. of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, etc.[15]

The act of February 14, 1903, creating the Bureau of Corporations provided that the commissioner should have the "power and authority to make . . . diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several states and with foreign nations, excepting common carriers."[16] Aside from the fact that the new act excepts banks in addition to common carriers, the investigatory provision of the new law is substantially the same as that of the previous law. It is therefore difficult to arrive at any other conclusion than that this provision of the new law merely transfers to the new Trade Commission powers formerly exercised by the old Bureau of Corporations. This view is supported by the conference report on the measure:[17]

B. Upon the direction of the President or either house of Congress to investigate and report the facts relating to any alleged violation of the anti-trust acts by any corporation.[18]

As is well known, the Department of Justice maintains a bureau of investigation. This bureau, as its name implies, is concerned with the investigation of violations of the laws of the United States, among them the anti-trust laws. How large a force of men from this bureau have been employed in the investigation of violations of these latter acts is not a matter of public record. That a considerable number have been so used is indicated by the number of complaints investigated. During the year 1912, the final year of Mr. Wickersham's incumbency, the agents of the department participated in a monthly average of more than 41 investigations of anti-trust complaints. Nor does this total greatly exceed the record for the year 1913 under Mr. Mc-

[15] Sec. 6 (a).
[16] 32 Stat. L. 825, 827.
[17] H. Rept. No. 1142, 63 Cong., 2 Sess., p. 18.
[18] Sec. 6 (d).

Reynolds, during which time the monthly average of complaints investigated was more than 36.[19] During the year 1913, the amount spent by the bureau of investigation of the Department of Justice upon trust investigations was exceeded only by the amount spent upon the investigation of white slave cases and was practically double that spent for any other purpose except the latter. Clearly, then, the function of investigating and reporting "the facts relating to any alleged violation of the anti-trust acts by any corporation" has been exercised for some time past with great thoroughness by the Department of Justice.

Probably the provision of the law which is now under discussion will ultimately result in the Trade Commission exercising the same authority over violations of the anti-trust acts as the Commerce Commission exercises over violations of the commerce act; that is, the investigatory work will be handled entirely by the commission and the prosecution of offenders will be left to the Department of Justice. This apparently was the intention of this particular subdivision and it may, I think, be assumed that the bureau of investigation of the Department of Justice will cease its activities so far as violations of the anti-trust acts are concerned, either through administrative order or because appropriations are cut off by Congress. If such is the result there is room for the contention that the effect of this clause is merely to transfer to the new commission a function formerly exercised by the Department of Justice.

C. Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust acts, to make investigation upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation.[20]

Does this provision secure any new advantage to the public? It has been frequently reported that the Department of Justice has undertaken a widespread inquiry into the tobacco business in order to arrive at a determination of the effectiveness of the plan of the Tobacco dissolution. If this report is correct, it would seem that this function with which the Trade Commission has been endowed has likewise been exercised by some other authority. Even if not correct it still remains true that such an investigation could have been prosecuted at any time by the Department of Justice

[19] *Report of the Attorney General,* 1912, 47; 1913, 45.

[20] Sec. 6 (c).

through its bureau of investigation and without the creation of a Trade Commission.

D. To investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States. . . .[21]

Here is a power apparently not previously exercised. It clearly increases the investigatory authority of the commission beyond that previously exercised by either or both the Bureau of Corporations and Department of Justice.

The powers of the commission in investigation are still further broadened by the provision:

E. That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.[22]

Reference to the act creating the Bureau of Corporations shows that it also had "the right to subpoena and to compel the attendance and testimony of witnesses and the production of documentary evidence."[23] But the provision of the new law gives the commission much broader powers than the similar provision gave to the bureau. This is because the powers of the commission are *in toto* much greater than were the powers of the commissioner of corporations, and the section of the new law under discussion applies to the exercise of any and all of them.

In endeavoring to estimate justly the worth of this power it would therefore be a mistake to regard it as merely the successor to powers formerly exercised by the Department of Justice and the Bureau of Corporations. While this appears to be true in some respects, the inquisitorial authority of the commission is, on the whole, much broader and all embracing. Again, the value of the investigations of the commission and of the recommendations which it is empowered to make ought to be much greater than those of either or both the Department of Justice and the Bureau of Corporations. It may be assumed the commission will devote a great deal of its time to this work, and that it will have a larger

[21] Sec. 6 (h).

[22] Sec. 9.

[23] 32 Stat. L. 825, 827.

force of investigators than both the bureau and the department combined. These facts coupled with the commission's broader powers should result in much more thorough investigations and in much sounder conclusions than have resulted in the past from the investigatory work of the Department of Justice and the Bureau of Corporations.

(3) The commission has the power:

To require . . . corporations engaged in commerce, excepting banks, and common carriers . . . or any class of them, or any of them . . . to file with the commission *in such form as the commission may prescribe*[24] annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization . . . and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing.[25] From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.[26]

The House bill, passed June 5, contained a provision requiring annual reports to the commission from corporations with more than $5,000,000 capital; also from corporations with a less capital but belonging to a class which the commission might designate. It also gave the commission power to prescribe "as near as may be a uniform system of annual reports."[27] The conference substitute for the provisions of the House bill seems to have been a wise change, if for no other reason than because of the very large number of corporations with more than $5,000,000 capital. Inasmuch as many of these are not organizations that may be regarded as monopolies or as being in restraint of trade, it is doubtful if the House provision would have effected any result not obtainable through the discretionary power now vested in the commission under conference bill of requiring annual or special reports in such form as it may prescribe. The provision of the new law in regard to reports will be of value to the commission in the exercise of its various other functions, especially those of investigation and recommendation.

The power of classifying corporations is apparently intended to supplement that given of requiring from corporations or any class of them annual or special reports in such form as the commission may prescribe. The effect of these two subsections combined is

[24] Italics are the writer's.

[25] Sec. 6 (b). [26] Sec. 6 (g).

[27] Sec. 9, H. R. 15613, June 5, 1914.

apparently to give the commission the power in its discretion to make a classification of corporations, and then, if it deem it fitting, to prescribe a uniform system of accounting for the reports of all members of each class. This situation may be of tremendous and far-reaching importance in arriving at a solution of the trust problem. As has been pointed out elsewhere,[28] there are no facts available at the present time which enable one to arrive at a determination of the question of whether great combinations and monopolies or independent competing organizations are the more efficient. These two clauses of the new law will make possible a determination of this character if the commission chooses to attempt it. Having designated as a class certain industries, in each of which both a large trust and one or more independent competitors exist, such uniform reports may be required from all organizations of the class as will make it possible to determine, upon a basis of production and selling costs, which type is the more efficient. If combination and monopoly is superior, we can then accept this principle and regulate organizations of this type so as to insure that the public will receive the benefits of their superior efficiency. If competition is the more efficient, we can continue the policy of "trust busting" with the thorough assurance that to do so is economically desirable.

(4) Perhaps the most important power of the Trade Commission and the one most likely to make this body an important administrative authority, is that over unfair competition. After declaring unfair methods of competition to be unlawful the new law declares that:

> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.[29]

The means provided for effecting this result may be summarized somewhat as follows:

When the commission believes that an organization is utilizing an unfair method of competition and it appears to it that a proceeding in this respect would be in the interests of the public, the commission issues and serves a complaint stating the charges and giving notice of a hearing at least thirty days after service. The party complained against has the right to appear and show cause why an order should not be entered requiring him to desist from

[28] Stevens, "Unfair Competition," *Political Science Quarterly,* vol. XXIX (June and September, 1914), pp. 282, 460.

[29] Sec. 5.

the violation of law charged in the complaint. Any party, upon good cause being shown, may be allowed by the commission to intervene and appear.

If upon hearing, the commission believes the method of competition in question to be prohibited, it makes a report in writing stating its findings as to the facts and issues an order to the party complained against ordering him to cease the use of the method in question. The commission may modify or set aside its report or order at any time prior to the filing of the transcript of the record of the hearing with the Circuit Court of Appeals.

In order to enforce the order of the commission it is provided that, if it is not obeyed, the commission may apply to the Circuit Court of Appeals of any circuit where the method in question was used, or the party resides or carries on business, filing the transcript of the record of the proceeding, including testimony. The court then takes jurisdiction, notifies the party, and has full power to enter a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, however, are conclusive if supported by testimony. If either party applies to the court for leave to adduce additional evidence and can show that it is material and that there were good reasons why it was not introduced before the commission, then the court may direct that such additional evidence be taken before the commission. This body may then modify its findings or make new ones, and again file the results with the court (which findings are deemed conclusive if supported by testimony), together with the additional evidence with its recommendations, if any, for the modification or setting aside of its original order. The judgment and decree of the Circuit Court of Appeals is made final, except that the Supreme Court may review upon *certiorari*. The jurisdiction of the Circuit Court of Appeals to enforce, modify, or set aside the orders of the commission is made exclusive and all such proceedings are given precedence over other cases and are required to be expedited in every way. The order of the commission or the judgment of the court to enforce the same cannot absolve any one from liability under the anti-trust acts. Any party against whom an order of the commission is made may obtain a review upon an application for the order to be set aside to the Circuit Court of Appeals.[30]

To what extent does the power given to the Trade Commission to prevent unfair methods of competition, and the mechanism pro-

[30] Sec. 5.

vided to secure this end, alter the situation from that which has prevailed in the past? In the first place, it may be forcibly contended that all unfair methods of competition fall within the scope of either restraint of trade or monopoly sections of the Sherman act, a contention which finds support in the numerous decrees that have been handed down enjoining practices and methods which must be regarded as unfair.[31]

From this point of view, neither a trade commission nor the authority given it to make orders against such practices was necessary, since the courts were exercising this function under the Sherman act. The new law, therefore, has merely conferred upon the commission the quasi-judicial function of passing upon the fair or unfair character of a given method—a determination formerly made judicially by the courts in passing upon questions of restraint of trade and monopoly.

At the same time, it must not be forgotten that the Sherman law refers to contracts, combinations, and conspiracies in restraint of trade, to monopolization, attempts to monopolize, and combinations and conspiracies to monopolize. Although these clauses would appear broad enough to cover all methods of unfair competition, might it not be true of prevention solely by the courts under the Sherman act that numerous cases of economically unfair methods would be construed, as in *United States* v. *Nelson*,[32] as not violative thereof? True, a court, the Circuit Court of Appeals, may by its decree alter or modify the order of the commission, but only if the commission applies for enforcement, or if application for a review is made by the party against whom the order is directed. Orders of the commission will not come before the court, therefore, either when they are obeyed or when no application for a review is made. One or the other of these two situations is likely to exist in many cases. Moreover, it may reasonably be expected that the Circuit Courts of Appeals will tend from the outset to rely upon the views of the commission and support its orders. The new law provides a body of men with wide investigating powers, who are, impliedly at least, to devote considerable attention to the study of unfair methods of competition. These five men ought, therefore, to become specialists in this subject. If so, their orders will be based upon economic rather than legal grounds. They ought, in consequence, to be more sound, on the

[31] *Cf.* decrees against American Thread, Burroughs Adding Machine, General Electric and American Coal Products companies, Eastern States Retail Lumber Dealers, Southern Wholesale Grocers Associations, and others.

[32] 52 Fed. 646.

whole, than have been the decisions of the courts in the past relating to this matter or than would be those decisions if the prevention of unfair methods had been entrusted to the courts alone. Unless the Circuit Courts of Appeals show a tendency to refuse to accept the guidance of the commission, the arrangements of the new law are likely to prove much more effective in eliminating unfair methods than the previous system whereby under the authority of the Sherman act occasional orders were issued against such practices by the court. Furthermore, they should, I think, be regarded as superior to leaving the matter of prevention solely in the hands of the courts.

The new law provides a simple and expeditious method of procedure. It is not necessary that the commission shall make an investigation before ordering a hearing. Instead, it may do this whenever it "shall have reason to believe" that a party has been using an unfair method, "and if it shall appear to the commission that a proceeding by it . . . would be to the interest of the public."[33] The findings of the commission are final as to the facts if supported by testimony. If the order of the commission is not obeyed, the case goes directly to the Circuit Court of Appeals whose jurisdiction over the orders of the commission is exclusive, and whose judgment and decree is final, except that it is subject to *certiorari*. Further, in the Circuit Court of Appeals these cases take precedence over all other pending cases and are required to be expedited in every way.

Another point in the unfair competition section deserves comment. When an application is made to introduce new evidence before the Circuit Court of Appeals the court *may* order it to be taken before the commission, which body may alter its findings or make new ones. This ought to result, if the courts commonly do this, in the commission being upheld in a larger proportion of cases than it otherwise would. This should tend to increase the dignity and the prestige of the commission.

[33] The last clause beginning with "and" apparently constitutes a limitation upon the power of the commission. If too narrowly interpreted its introduction into the bill would seem unfortunate. The clause implies that a method should not be the subject of the orders of the commission unless of interest to the public. If the commission is broad-minded enough to see that the use of every unfair method is of public interest through the fact that over perhaps a very long period of time the ultimate consequences and results of its employment will be to eliminate efficient competitors or shut out prospectively efficient ones, then this clause is of no moment. If, on the other hand, the commission concerns itself only with the immediate consequences of a given act unfortunate results may occur.

One is therefore led to inquire why it was not made mandatory upon the Circuit Court of Appeals to refer the new evidence to the commission instead of providing that this reference should be discretionary. Little or nothing would have been lost thereby, and the commission would probably have been assured a somewhat greater importance.

On the whole, I think, it must be concluded that the power over unfair methods of competition which has been given to the Trade Commission is an important step in the direction of eliminating those practices and therefore toward the ultimate solution of the trust problem.

Enforcement of the law. A serious question which must always arise in any analysis of a law is the method of enforcement. The mechanism provided for the enforcement of the unfair competition section has already been outlined. If the order of the commission is not obeyed that body may apply to the Circuit Court of Appeals, which may affirm or modify the order of the commission. The compliance of an organization with the decree entered by the court is to be obtained through the fact that if it is not obeyed contempt proceedings may be instituted. In other words, in the last analysis the enforcement of the orders of the commission relative to unfair competition rests upon injunctions and the customary legal procedure that follows failure to obey them. Is this sufficient to secure the desired result?

Elsewhere the writer has endeavored to indicate that if it were possible to prevent or eliminate unfair competition we should have taken a long step on the road to the solution of the so-called trust problem. Regarding the suppression of unfair competitive methods as fundamental, the writer, in the article just cited, was inclined to favor imprisonment as the sole punishment for such offences. This view was induced partly by the comparatively light punishments for violations of the Sherman act,[34] partly by the

[34] The following is a table showing the small fines that have been the sole punishment in certain cases of restraint of trade under the Sherman act, where convictions under the criminal clause have been secured. It should be borne in mind that these total fines are usually distributed among several individuals thus making the sum paid by each a really insignificant matter:

U. S. v. *Simmons* (1903)	$265
U. S. v. *National Umbrella Frame Co.* (1907)	3,000
U. S. v. *Santa Rita Mining & Store Cos.* (1907)	2,000
U. S. v. *Federal Salt Co.* (1903)	1,000
U. S. v. *F. A. Amsden Lumber Co.* (1906)	2,000
U. S. v. *Imperial Window Glass Co.* (1910)	10,000

fact that injunctions in proceedings under the Sherman act have not always been obeyed,[35] and partly by the belief that adequate enforcement of any law can be secured only when individuals have a wholesome fear of a punishment which will follow its violation.[36]

It may well be, however, as has been pointed out to the writer, that public sentiment is not yet ripe for this step and that the result of any such provision would be to render such a law nugatory for the reason that no jury would convict knowing that a prison sentence would be inevitable as a result. On the other hand, it should not be forgotten that subject to no worse penalties than are provided in the Sherman act (penalties which have not proved extraordinarily effective in the past), a concern may use all the unfair methods which it chooses until the commission intervenes. Further, it may even then continue to use them until the court has handed down its decree.

The new law also prescribes necessary penalties in the form of fines or imprisonment or both for neglect or refusal to testify or produce documentary evidence in obedience to a subpeona; for wilful false entries in reports; and for wilful removal out of the jurisdiction of the United States or wilful mutilation of documentary evidence. Failure to file reports thirty days after notice of a default is punishable by a fine of $100 per day.

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[35] *Cf.* in this connection contempt proceedings against the Southern Wholesale Grocers Association for violating the injunction of the court against classification. This practice the court held to be within the scope of the Sherman act. As bearing upon enforcement, it is worth noting that the contempt proceeding resulted in the imposition of a total fine of $5,500. As this was divided among three persons it was certainly far from a drastic punishment. May it not be that as long as the profits of violating the anti-trust acts exceed the amount of fines imposed the violations will continue whether those fines are the result of criminal suits or of contempt proceedings for disobedience to decrees?

[36] See testimony of Mr. Kohler as to his conference with Messrs. Ahrens, Clifford, and Torrance with reference to Kohler's joining the Bathtub combination. This testimony is to the effect that Clifford stated that all the government could do was to break up the show. *The United States* v. *Standard Sanitary Manufacturing Co. and others,* Record U. S. C. C. for the District of Maryland, vol. I, p. 256.

CAPITALIZATION VERSUS PRODUCTIVITY: REJOINDER

Dr. Brown's restatement of the productivity theory of interest has one distinctive merit.[1] It abandons the attempt to make a fallacious enterprise-profit rate of productivity an element in the explanation. Every previous formulation, not excepting Dr. Brown's own, has been open to this charge. The recent discussion has yielded a substantial result in this admission that the productivity theorist is bound to show the existence of a definite rate of physical productivity to which the rate of interest conforms, quite apart from any borrowing producers' rate of profit. Dr. Brown courageously undertakes this task, and his results must be judged by this criterion.

At the same time, however, he prudently limits his defense to the very narrowest scope that ever has been claimed for the theory. He makes a virtue of eclecticism (p. 349), and claims for productivity only a little part, an irreducible minimum. In the manner much in vogue since Böhm-Bawerk led the way, he concedes much of the field to the purely psychological explanation. Interest admittedly would exist in a world of desires and mere scarcity, without physical productivity, either direct or indirect for that matter. The capitalization theory alone could apply in such cases. It is admitted further that time-preference exists in every case, as well where there is as where there is not physical production of indirect agents. The claim Dr. Brown makes now is merely that when a physically productive process is employed to create an indirect agent, *then* the rate of productivity which he believes is involved *may* assume the dominant role and determine the rate of time-preference. I say "*may* assume," not necessarily assumes, for here the claim is narrowed astonishingly as compared with previous versions of the productivity theory. In previous versions the supposed regulative rate has been believed to dominate wherever there was an indirect (roundabout) process. In Dr. Brown's version this claim is limited to situations where fruits are being produced *at the same time*, in the same economy, by labor used in two different technical processes, one direct and the other indirect, one productive of more, the other of fewer

[1] American Economic Review, June, 1914, p. 340, in reply to my article on "Interest Theories, Old and New," in the Review for March, 1914.

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The Clayton Act

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On account of the continual shifting of the rural population, the character of his neighbors is ever a matter of uncertainty. There is, moreover, no religious or communal bond to overcome the mutual distrust that frequently arises. These conditions militate strongly against the growth of a coöperative spirit. In the second place, a majority of the country banks are already owned by farmers who represent perhaps the best ability in the farming occupation and who would resent actively the formation of competitive organizations in their communities. Finally, farmers are suspicious of coöperative enterprise in all its forms. Partly for this reason coöperation in buying and selling has made little headway. The number of failures has been large. It would seem unwise therefore to advocate the establishment of farmers' coöperative banks until coöperation in its milder and safer forms has secured a permanent footing.

In view of the inability of farmers either through individual initiative or collective action to deal adequately with the rural credit problem the question arises, Could the state, through legislation, enable the farmer to obtain his loans at a lower rate of interest?

Reference has already been made to the possibility of reducing interest rates by a repeal or modification of state laws now prejudicial to the lender. In addition, it might be well to consider the adoption of a land title registration law, otherwise known as Torrens law. Such a law, while not directly affecting the rate of interest, would greatly reduce the cost of borrowing. At present the cost of establishing a title prior to the granting of a loan may make the cost of borrowing prohibitive.

It is questionable whether state legislation should go any further. If the state were to attempt to solve the rural credit problem by making loans directly to farmers, it would be necessary, in providing sufficient funds for this purpose, to issue long-term bonds secured by mortgages on farm lands. In the opinion of the writer, however, this plan of dealing with the situation, while sound in principle, is too comprehensive to be within the purview of state legislation. The problem of giving to agriculture its proper place in the nation's business has become national in scope, therefore the larger program is one for federal rather than state initiative. This would insure the effective application of a common remedy to like conditions. It would be merely a continuation of the government's liberal land policy.

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THE CLAYTON ACT

As indicated in the previous article[1] the tentative bills other than the Railroad Securities and Trade Commission measures were taken in charge by Representative Clayton's Committee on the Judiciary. These former measures constituted the basis of the Clayton act, now a part of the law of the land.[2]

[1] This article is the second of two studies of the new trust legislation. The preceding one, "The Trade Commission Act," appeared in the December number of the REVIEW (vol. IV, p. 840). The writer wishes to call attention to an error in the first article which was discovered too late to allow of correction. On page 852 read *Whitwell* v. *Continental Tobacco Co.* for *United States* v. *Nelson;* and in footnote 32 read 125 Fed. 454 instead of 52 Fed. 646.

[2] The legislative history of the Clayton act may be sketched as follows:

(Except where otherwise indicated all references in this footnote refer to pages in volume 51 of the *Congressional Record.* Page numbers alone have therefore been used. It should be noted that these page numbers are those of the *Record* as it appears from time to time and that they differ from the paging found in the bound volumes ultimately issued. The latter statement applies to the sketch of the legislative history of the Trade Commission act which appeared in the preceding number of the REVIEW. It was only recently that the writer discovered the discrepancy in the two pagings. He did not, therefore, make note of this point in the preceding article.)

On April 14, 1914, Representative Clayton introduced a general bill to supplement existing laws against trusts (H.R. 15657) and the bill was referred to the Committee on the Judiciary of which he was chairman (p. 7244). In this measure there were practically included the tentative bills drawn to cover trade relations, holding companies, and interlocking directorates (*cf.* text of tentative bills and also *Financial Chronicle,* vol. 98, p. 1210). On May 6 Mr. Clayton reported the measure with amendments accompanied by a report (no. 627) and both bill and report were placed on the House calendar (p. 8513). In several respects the amended measure differed from that originally offered on April 14. Alterations were made in the section relating to the issue of injunctions. Several clauses were added in the section prohibiting interlocking directorates, among them one providing that the section should not apply to mutual savings banks not having a capital stock represented by shares. The declaration of the earlier bill that nothing in the anti-trust laws should be construed to forbid the existence of labor unions, agricultural associations, etc., was extended by the new measure to include associations of the traffic, operating, accounting or other officers of common carriers for the making of lawful agreements.

On June 5 the bill was considered by the Committee of the Whole House on the State of the Union and passed 277 to 54 (p. 10,745). On June 6, together with the Trade Commission bill (H.R. 15,613), the Clayton bill (H.R. 15,657) was referred to the Senate Committee on Judiciary (p. 10,770). On July 22 Mr. Culberson reported out the bill with amendments accompanied by a report (no. 698) and the bill was placed on the calendar (p. 13,618).

Broadly speaking, the various sections of the Clayton act may be classified under three heads: (1) Those declaring certain acts unlawful and prohibiting them; (2) those designed to enforce

Several changes had been made in the measure as passed by the House on June 5. Easily the most important were the provisions giving to the Trade and Interstate Commerce commissions authority to enforce compliance with those sections prohibiting price discriminations, interlocking directorates, holding corporations, and exclusive and tying arrangements. Almost equally significant was the elimination of the fine and imprisonment penalties which the House measure had provided as punishments for violations of three of these sections, *i.e.*, those directed against price discriminations, holding corporations, and exclusive and tying arrangements. This amended measure was altered by the Senate in a number of respects. That body struck out entirely the provision forbidding price discriminations. It also in the Committee of the Whole eliminated the section prohibiting exclusive and tying arrangements but later adopted a substitute. A new section forbade common carriers, except under certain conditions, from having dealings to the extent of more than $50,000 a year with certain classes of concerns in which its own officers or agents were interested.

On the last day of August a unanimous consent agreement was secured for a vote on the Clayton bill (pp. 15,795-15,796) and two days later the measure passed the Senate by vote of 46 to 16 (p. 15,970).

In view of the several additions which were made by the Senate and the elimination of many of the clauses of the bill as it had passed the House, a disagreement was a foregone conclusion. On September 4, Representative Webb asked unanimous consent for a disagreement to the Senate's amendments and for a request for a conference. No objection being made, the chair appointed Representatives Webb, Carlin, Floyd of Arkansas, Volstead, and Nelson (p. 16,103). A message having informed the Senate of these facts, the motion of Senator Culberson that the Senate insist on the amendments and that the chair appoint conferees on the part of the Senate was agreed to. The vice-president thereupon appointed Senators Culberson, Overman, Chilton, Clark of Wyoming, and Nelson (p. 16,084).

On September 23 Senator Culberson presented the conference report on the Clayton measure (p. 17,018). But owing to the fact that in certain particulars the report was not sufficiently explicit to give directions to the enrolling clerk he withdrew it upon the following day and submitted a new report (p. 17,066). Several days of debate in the Senate followed, during which the conference report was strenuously attacked by Senator Reed of Missouri because of its elimination of criminal penalties. It was this fact that led him on October 5 to offer a motion to recommit the conference report with instructions to the Senate conferees to insist upon the insertion in the bill of the criminal penalties substantially as these had appeared in the House measure. The motion failed, 35 to 25 (pp. 17,694-17,697), and the Senate by a vote of 35 to 24 thereupon agreed to the report (p. 17,698).

In the House the conference report was presented on September 25 by Mr. Webb (p. 17,171). It met with objections similar to those raised by Mr. Reed in the Senate but was ultimately agreed to on October 8 by a vote of 244 to 54 (pp. 17,890-17,891). On the following day the measure

compliance with the prohibitions of the act; (3) those relating to legal processes, including the issue of injunctions, the prosecution of actions for contempt, etc.

The new law declares:[3]

A. That it shall be unlawful for any person engaged in commerce to make discriminations in prices between different purchasers of commodities sold for use, consumption, or resale, where the effect of the discrimination may be to substantially lessen competition or tend to the creation of a monopoly.[4]

B. That it shall be unlawful for any person engaged in commerce to lease, sell, or contract for the sale of goods, etc., patented or unpatented, or to fix a price charged therefor, or discount, or rebate, upon such price, conditioned upon the lessee or purchaser thereof, not using or dealing in goods, etc., of competitors of the lessor, or seller, where the effect may be to substantially lessen competition, or tend to create a monopoly.[5]

C. That no corporation shall acquire the whole or any part of the stock or other share capital of another corporation, or two or more corporations, where the effect may be to substantially lessen competition, to restrain commerce, or to tend to create a monopoly.[6]

D. From and after two years from the date of the approval of the act:

1. No person shall be a director or other officer or employee of more than one bank (etc.) organized under the laws of the United States if anyone of them is above a certain size; and no private banker, or person who is director in any bank or trust company organized under

was reported from the Committee on Enrolled Bills and was signed by the Speaker of the House and the Vice-president (pp. 17,955, 17,980). The bill was presented to the President on October 10 and was approved by him on October 16.

[3] Prohibitions. On account of the length of these they have not been quoted in full, but only their content given. All references except where otherwise indicated are to sections of the bill as reported by the conference committee.

[4] Sec. 2. Differences of prices, due to grade, quality or quantity, or which make due allowance for difference in cost of selling or transportation, or made in good faith to meet competition are specifically excepted.

[5] Sec. 3.

[6] Sec. 7. Specifically excepted from the operation of this section are corporations purchasing such stock solely for investment and not using it to substantially lessen competition; subsidiary corporations formed for the carrying on of lawful business or natural and legitimate branches thereof, where the effect of such formation is not to substantially lessen competition; common carriers aiding in construction of branch lines or acquiring or owning the stock of such branches, or of a branch line constructed by an independent company where there is not substantial competition between branch and main line companies; common carriers extending lines by the acquisition of the stock of other carriers where there is no substantial competition between the two.

the laws of any state, and above a certain size, shall be eligible as a director of any bank or banking association incorporated or operating under the laws of the United States.

2. No bank (etc.) organized or operating under the laws of the United States in any city, incorporated town or village, of more than 200,000 inhabitants shall have as director or officer or employee any private banker or any director or any other officer or employee of any other bank (etc.) located in the same place.

3. No person shall be a director at the same time in any two or more corporations (other than banks, etc., and common carriers) engaged in interstate commerce, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, if such corporations have been competitors so that the elimination of competition between them will constitute a violation of any of the provisions of the anti-trust laws.[7]

With regard to some at least of the principal prohibitions contained in the Clayton bill, the same argument may be made as was suggested against the unfair competition section of the Trade Commission bill, *i.e.*, that such provisions are unnecessary since the Sherman act embraces them in the same way, as it includes unfair methods of competition. Compare for example, the price discrimination section of the Clayton bill with the statement of the court in its decree against the General Electric Co.:

The General Electric Company and the other defendants are each enjoined and restrained from offering or making more favorable prices

[7] Sec. 8. Under Sec. 10 common carriers are forbidden after two years to have dealings in securities or supplies, etc., or to make or to have construction or maintenance contracts to the amount of more than $50,000 in the aggregate in any one year with another organization, when the common carrier has on its board of directors or as its president, manager, or purchasing or selling officer, or agent in the particular transaction, any person who is at the same time, a similar officer of or has any substantial interest in the organization from which the purchases are made, unless such dealings, etc., shall be with the most favorable bidder, who is to be ascertained by competitive bidding. Severe penalties are provided for the violation of this section. Such an interlocking between the officers or agents of a railroad and a supplying concern might result in other supplying concerns being unable to compete for the business of the road in question. In this way a relatively inefficient organization might be perpetuated, and a relatively efficient one prevented from attaining that development to which its efficiency entitles it.

In such circumstances we should clearly have a case of economically unfair competition which presumably at least is prohibited by the Trade Commission act. Although in consequence the provision under discussion may seem to be an instance of duplication, it is hardly that in reality. By making all except minor contracts open to competitive bidding it attempts to eradicate a situation out of which unfair competition might arise. It would seem therefore to be both a sound and a wise provision.

or terms of sale for incandescent electric lamps to the customers of any rival manufacturer or manufacturers than it at the same time offers or makes to its established trade, where the purpose is to drive out of business such rival manufacturer or manufacturers, or otherwise unlawfully to restrain the trade and commerce of the United States in incandescent electric lamps; provided that no defendant is enjoined or restrained from *making any prices for incandescent electric lamps to meet, or to compete with, prices previously made by any other defendant, or by any rival manufacturer.*[8]

The wording of section 3 of the Clayton act (B above), I think, clearly prohibits exclusive purchasing and selling, as well as tying arrangements. This section, therefore, has a twofold aspect. Regarding exclusive selling, a United States court had this to say in the recently decided Thread case:

The defendant corporations, together with their directors, officers, managers, agents, and employers . . . be and they hereby are jointly and severally enjoined . . . (i) From soliciting or exacting from wholesale or retail dealers or jobbers or from customers of competitors in the United States any agreement not to handle or to cease handling the brands of competitors; or from refusing to deal with, or discriminating against . . . those who handle the goods of competitors; or from canvassing the retail trade of any dealer or jobber and thereupon offering the orders thus obtained to such dealer or jobber upon condition that he shall cease to buy thread from a competitor of the defendants.[9]

Similarly a court decreed in the Electric Lamp case, regarding exclusive purchasing:

That the General Electric Company and the other above-named Lamp Manufacturing Defendants, and each of them, their officers, agents and servants, are perpetually enjoined and restrained from making or enforcing any contracts, arrangements, agreements or requirements with dealers, jobbers and consumers, who buy from the said defendants either tantalum filament, tungsten filament, metallized carbon filament or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers and consumers are compelled to purchase all their ordinary carbon filament lamps from said defendants as a condition to obtaining such other types of lamps, or any of them, or by which dealers, jobbers and consumers are compelled to purchase any one or more of the above-mentioned types of lamps; . . . as a condition to the purchase . . . of any other or all of said types of lamps; and the said General Electric Company and . . . Defendants aforesaid are perpetually enjoined and restrained from discriminating against any dealer, jobber or consumer desiring to purchase tantalum, tungsten or metallized carbon filament lamps because of the fact that

[8] Italics are the writer's. *U. S.* v. *General Electric Co.,* Final Decree, U.S.C.C. for the Northern District of Ohio, Eastern Division, p. 9.

[9] *U. S.* v. *American Thread Co.,* Final Decree, U.S.D.C. for the District of New Jersey, p. 9.

such dealer, jobber or consumer purchases ordinary carbon filament lamps from others, and . . . from discriminating against any dealer, jobber or consumer desiring to purchase any one or more of the above-mentioned types of lamps because of the fact that such dealer, jobber or consumer purchases any other of said lamps from other manufacturers or dealers.[10]

Again, in view of the Northern Securities, the Oil and the Tobacco decisions one many not unreasonably contend that the provisions of the Sherman act are sufficiently broad to include acquisitions on the part of one corporation engaged in commerce of the stock of one or more others where in the words of the Clayton act "the effect of such acquisition may be to substantially lessen competition" between them "or to restrain such commerce · . . or tend to create a monopoly of any line of commerce." [11]

It would therefore appear possible for one to question whether very positive advantages have been secured by the provisions of the new law prohibiting price discriminations, exclusive purchasing and selling arrangements, and holding corporations. Would not the courts in any case coming before them have construed the Sherman act to embrace all these situations provided there was any substantial lessening of competition, restraint of trade, or tendency to create a monopoly?[12]

From the standpoint of the writer, price discriminations and exclusive and tying arrangements must be regarded as methods of unfair competition.[13] Since the Trade Commission act expressly declared unfair methods of competition to be unlawful, it follows that there is duplication involved to a considerable extent in declaring specific methods unlawful.[14]

In view, however, of the importance of the elimination of methods

[10] *U. S.* v. *General Electric Co.,* et al., Decree, *cit. supra,* pp. 7-8.

[11] Sec. 7.

[12] It is to be noted, however, that the acts now under discussion are prohibited not where the effect *"is"* to substantially lessen competition (etc.), but where the effect *"may be"* to do so. To the writer *"may be"* would seem to imply that the acts enumerated are prohibited if there is a possibility that competition will thereby be substantially lessened (etc.). If this view is a correct one, the new law will probably reach many acts to which the Sherman act could not possibly be construed to extend.

[13] Stevens, "Unfair Competition," *Pol. Sci. Quart.,* vol. XXIX, pp. 282, 460. See especially sections I, IV, V, and VI.

[14] It is but fair to say that the debates on the conference report show that some senators and congressmen recognized this fact. *Cf.* Senators Borah and Culberson in the original numbers of the *Cong. Rec.,* vol. 51, p. 17,297; and Representative Webb, p. 17,823.

of unfair competition, it seems highly probable that, if little has been gained by this duplication, at least no harm has been done. So far as tying arrangements are concerned, their prohibition by statute was necessary. As was pointed out by Senator Walsh, the Trade Commission

> could not declare the tying contract unlawful or assert that the use of it in connection with the sale or lease of or license to use a patented article constituted unfair competition, because the Supreme Court of the United States had approved of such a contract in the case of Henry against Dick . . . as being strictly within the rights of the patentee under the law as it stood.[15]

Interlocking directorates have never been, so far as the writer knows, declared unlawful by any specific decision of the courts, although some dissolution plans have temporarily forbidden such arrangements as to the separate units into which an illegal organization has been split.[16]

It would be too broad a generalization to assert that the interlocking of directors constitutes unfair competition. But though not unfair, *per se*, it is none the less true that such an arrangement may result in unfairness through the fact that an interlocked concern may thus be enabled to purchase at preferential rates as compared with its competitors.[17] Although this fact alone would appear to constitute a sufficient economic reason for the prohibition of interlocking directors, would not any sound interpretation of the unfair competition section of the Trade Commission act extend to all cases of this character? Is not a needless duplication, therefore, also involved in this case?

Both these questions may, I think, be answered in the affirmative. Yet it should not be forgotten that many preferential contracts would probably never have been made but for the existence of interlocking directors. From this standpoint the prohibition appears essentially sound. It goes to the root of the matter by attempting to eradicate a class of conditions which has undoubtedly been responsible for certain preferential contracts. At the

[15] *Ibid.*, p. 17,689.

[16] During a period of five years, "None of said corporations shall have any officer or director who is also an officer or director in any other of said corporations." *U. S.* v. *E. I. DuPont de Nemours & Co. and others.* Opinion of the Court and Final Decree, U.S.D.C. for the District of Delaware, p. 12. A similar provision will be found in the Tobacco Dissolution plan.

[17] *Cf. op. cit.* Stevens, sec. VI, p. 462, and also *U. S.* v. *American Can Co.* Original Petition, U.S.D.C. for the District of Maryland, pp. 18-19.

same time is is scarcely necessary to point out that interlocking directors are not a *sine qua non* for securing either preferential contracts or centralization of control in the management of the affairs of certain large corporations. Dummy directors have existed in the past and will continue to exist. Through brothers, sons, and more distant relatives and also through friends, the same ends may and not infrequently will be obtained as have been secured in the past through the medium of interlocking directors.

Enforcement. Two methods of treating violations of the principal prohibitions[18] of the Clayton act are provided. Section 11 declares that the authority to enforce compliance with the sections containing these prohibitions

> is hereby vested in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce.[19]

The manner of the exercise of the authority thus given is in all respects identical with the procedure of the Trade Commission in preventing unfair competition. And since the latter has been fully outlined in the preceding article[20] it need not be repeated here.

As indicated above, the courts have construed the Sherman act to embrace price discriminations, exclusive arrangements, and holding corporations. It might therefore be contended, were the Trade Commission given the sole power of enforcing compliance with these prohibitions, that this body in so doing is merely the successor to functions that were formerly exercised by the district and circuit courts of the United States; and consequently that nothing has been gained by vesting these powers in the Trade Commission. A similar point was made, it will be recalled, regarding the authority of the Trade Commission over unfair methods of competition.

In general, arguments similar to those which the writer indicated in favor of vesting in the Trade Commission the power over unfair competition, may also be advanced to support the authority given to this body of enforcing compliance with the prohibitions of price

[18] Price discriminations, "tieing" and exclusive arrangements, holding corporations and interlocking directorates.

[19] Sec. 11. The writer has omitted from the remainder of the discussion any consideration of this section as applied to banks and common carriers.

[20] American Economic Review, vol. IV (Dec., 1914), pp. 850-851.

discriminations, exclusive and tying arrangements, interlocking directorates, and holding corporations, *i.e.*:

(a) That there is some administrative advantage in having these prohibitions handled through the commission with direct and final appeal[21] to the Circuit Court of Appeals, etc., instead of leaving enforcement to the ordinary mechanism of the Department of Justice and the courts.

(b) That the commission ought and probably will be able to discover and prohibit infractions of the principal acts made unlawful by the Clayton measure, in a much more thoroughgoing fashion than was possible through the Department of Justice and the courts, because of the broader powers of investigation which the commission possesses and the larger force of investigators which it may be assumed that it will have at its disposal.

Apparently, then, the section under discussion should considerably enlarge and increase the administrative authority of the Trade Commission. This would still be true even though it were assumed that the enforcement of the prohibitions of local price cutting and exclusive and tying arrangements were embraced by the unfair competition section of the Trade Commission bill. In such case the commission would still exercise administrative authority over both holding corporations and interlocking directorates. Its powers, therefore, would appear to be considerably greater than those originally granted by the measure creating it. But whether as a matter of actual fact, the Clayton law has measurably extended the powers of the Trade Commission must, I think, remain somewhat problematical. The reason for this is found in the fact that the Trade Commission is not given sole authority to enforce compliance with the principal prohibitions of the Clayton act. Section 15 of the new law provides, without making any exception of the enforcement of the provisions entrusted to the Trade Commission under section 11:[22]

That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

[21] Except in case of a writ of *certiorari* from the Supreme Court.

[22] And also to the Interstate Commerce Commission in the case of common carriers and the Federal Reserve Board in the case of banks.

It appears, therefore, that both an administrative and a judicial authority are provided for enforcing compliance with the prohibitions under discussion. That it was intended to give the district courts and Trade Commission concurrent jurisdiction and not to vest this authority solely in the commission is undoubtedly true,[23] but what advantages this division of jurisdiction will afford, it is a little difficult to comprehend. True, there might be violations of the act other than those of which the Trade Commission is given jurisdiction, but the latter cases might easily have been excepted from the operation of section 15, thereby securing such advantages as ought, in the estimation of the writer, to accrue from the arrangements provided in section 11. Why, after providing through the Trade Commission a complete and on the whole commendable mechanism for enforcing compliance with these sections, was it regarded as either necessary or advantageous to provide another means of enforcement? The only possible ground which the writer is able to suggest is that it was thought that enforcement might perhaps be facilitated by having both the commission and the Department of Justice on the watch for violations. On the other hand, is not this possible advantage of concurrent jurisdiction more than offset? The effect of section 11, taken by itself, was to considerably strengthen and increase the administrative power of the Trade Commission by giving it authority over the enforcement of the principal prohibitions of the Clayton act. This certainly seems desirable since we are to have a Trade Commission. But it is possible to escape the conclusion that this increased administrative authority is and will be, at least to a considerable extent, nullified by the provisions of section 15 investing the judicial branch of the government with a concurrent jurisdiction in that enforcement?[24]

[23] *Cf.* statements of Representative Webb of the conference committee in the original numbers of *Cong. Rec.*, vol 51, p. 17,824. The writer also has a letter from a member of the conference committee stating that it was intended to give concurrent jurisdiction.

[24] It should, of course, be pointed out that only the actual results of the operation of these two sections can determine the question. It may happen that the complaints of various parties will be made in practically all cases to the Trade Commission. A fact which would seem to militate against this result is that under the Sherman act it has for years been customary for complaints to be made to the Department of Justice or its officials. It seems not unreasonable to assume, therefore, that there is some likelihood that such will continue to be the practice, at least until people become more familiar with the Trade Commission as an enforcing authority. On the other hand it is, of course, true, since the initiation of proceedings in such

A fact which points strongly to an affirmative answer to this question is the somewhat peculiar and, in the estimation of the writer, unfortunate situation in the matter of appeal, which seems to have been created by this concurrent provision. As we have seen, the Circuit Court of Appeals, under section 11, has final and exclusive jurisdiction[25] of orders of the Trade Commission relating to price discrimination, exclusive and tying arrangements, holding corporations and interlocking directorates. If, however, cases involving these points come before the district courts, under section 15 they go directly from these courts to the Supreme Court upon appeal. This situation arises through the following facts. The expediting act of February 11, 1903, provided that in every equity proceeding brought in the circuit courts by the United States as complainant, under the Sherman act, the Interstate Commerce act "*or any other acts having a like purpose that hereafter may be enacted,*" an appeal would lie *only* to the Supreme Court.[26] The act of March 3, 1911, which abolished the circuit courts, declared that "Whenever, in any law not embraced within this act, any reference is made to . . . the circuit courts, such reference shall . . . be deemed and held to refer to . . . the district courts."[27]

It therefore appears, so far as the writer is able to see, that both the Supreme Court and the Circuit Court of Appeals have the power to render *final* decisions upon the principal prohibitions of the Clayton act, and that the one or the other will render them according as the particular case is brought through the District Courts or the Trade Commission. Is it then to be expected that an order of the Trade Commission even though backed by the decision of the Circuit Court of Appeals will command respect until or unless the same point has arisen in another case in the courts and the Supeme Court has rendered a decision thereon affirming that of the Circuit Court of Appeals?

cases must rest with the Department of Justice, that the instructions of the President to the Attorney General might result in but few cases being brought through the district courts and in the complaining parties being referred to the Trade Commission. Other factors may also have considerable effect, such as the amounts of money appropriated to the Department of Justice for enforcing the laws, etc.

[25] Except in case of *certiorari* from the Supreme Court.

[26] 32 Stat. Law 823. Italics are the writer's. The act of 1910 amending this act did not alter this provision.

[27] Act of March 3, 1911; in effect Jan. 1, 1912.

It also follows, I think, on account of section 15, that so far as sections of the act deal with methods of competition which may be regarded as unfair, the jurisdiction of the Trade Commission over this matter is a concurrent one, and not, as might be inferred from the Trade Commission bill, an exclusive one. The same thing obviously is also true of the jurisdiction of the Circuit Court of Appeals over the orders of the Trade Commission relating to the same subject.

The Clayton measure as passed is practically free from criminal penalties.[28] Hence, enforcement of its prohibitions rests principally upon contempt proceedings for disobedience to the decrees of the courts[29] as is the case with the enforcement of the unfair competition section of the Trade Commission act. Except so far as unfair competition is concerned, the writer is not strongly impressed with the need of other penalties than those afforded by contempt procedure.

Other provisions of the Clayton act may also have some effect upon its enforcement. Thus:

> A final judgment or decree hereafter rendered in any criminal prosecution . . . or proceeding in equity brought by and on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.[30]

This provision is further strengthened by a clause in the same section providing (whenever the United States begins action) for the suspension during the pendency thereof of the running of the statute of limitations in respect to private rights of action based upon the complaint in the said action. The original House measure had provided that a judgment in favor of the United States should be "conclusive evidence of the same facts" and "the same questions of law in favor of any other party."[31] Since this clause would seem to be of questionable constitutionality, it is

[28] The House measure provided fines and imprisonment or both as penalties for price discriminations, holding companies, interlocking directorates, and exclusive and tying arrangements. All these penalties, however, were eliminated either by the Senate or the conference committee.

[29] Unless the criminal clauses of the Sherman act were invoked. This could, of course, be done in every case where a contract, combination, or conspiracy in restraint of trade or monopolization, etc., could be shown.

[30] Sec. 5. Certain exceptions are made in the case of pending suits.

[31] Sec. 6 of the Clayton bill as it passed the House.

likely that the change to the provisions of the conference measure mentioned above was a wise one.[32]

Section 14 provides that the violation of the penal provisions of the anti-trust acts by a corporation is to be deemed also that of the directors and others authorizing the act, and provides a fine of $5000 or imprisonment not exceeding one year, or both. That this personal guilt section will have any appreciable effect upon the enforcement of the law is rather doubtful. The punishment is no more severe than that provided by the criminal clause of the Sherman act. Over and over again individuals have been proceeded against criminally under that act, and have been convicted and sentenced by the courts. Since the Sherman act still remains in force it seems doubtful if this provision was particularly necessary, or if it will have important results.

Section 4 permits the recovery of threefold damages for injury by reason of anything forbidden in the anti-trust laws. This section is merely a reënactment of section 7 of the Sherman act, but applies to all the anti-trust laws instead of merely to the Sherman act as was, of course, the case with the last-mentioned section. An additional protection, which is afforded to the individual by the new law is found in the provision:

> That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . .[33]

Most people will be inclined, I think, to pass a favorable judgment upon these provisions. In enabling the individual to better protect himself, they may and very probably will tend to decrease the number of violations of the anti-trust laws.

A final point regarding the enforcement of trust legislation in general should be noted. It would seem likely that the omission of practically all criminal penalties from the new laws will tend to result in their being enforced rather by civil procedure than by criminal process. While it is true that the Sherman act remains in force, the new legislation so clearly indicates civil process as the remedy to be pursued that it seems scarcely likely that violations of the new laws will be prosecuted criminally[34] even though they at

[32] These were similar to the provisions substituted by the Senate for the original House provisions.

[33] Sec. 16.

[34] Except as to the enforcement of sections 9 and 10 which relate to common carriers.

the same time constitute violations of the act of 1890. May there not also be a tendency, partly as a result of this situation, to prosecute civilly rather than criminally such violations of the Sherman act, if any, as could not be regarded as coming within the scope of the provisions of the new legislation? It seems highly probable that the new laws mark a turning point in the attitude toward trusts; that criminal penalties are no longer to be relied upon for the enforcement of trust legislation, but that in the future this is to be handled entirely through civil suits in the courts or else by an administrative body, the Trade Commission. This in turn appears to point to the ultimate result that the control of trusts will be vested entirely in an administrative board.

Procedural and other sections. The sections of the act that have not already been discussed relate to judicial processes, procedure, etc. Consideration of these provisions will be omitted because of their relative unimportance in trust regulation and also in order not to expand unduly this article. Their content, however, may be briefly summarized: Suits under the anti-trust laws against a corporation may be brought in any district where the corporation may be found,[35] and, in the case of suits brought by the United States, subpoenas shall run to districts other than those where the suit is instituted.[36] Sections 17 to 20, inclusive, deal with injunctions, the methods and conditions of issue, etc. These sections prohibit their use in labor disputes growing out of the terms and conditions of employment, unless necessary to prevent irreparable injury to property rights for which there is no adequate remedy at law. They also forbid their use in such disputes against strikes and picketing and boycotting, which are specifically declared not to be violations of any law of the United States. Sections 21 to 25 relate to contempts, contempt procedure, and punishments in suits other than those brought by or on behalf of the United States. Section 6 declares that the labor of a human being is not a commodity or an article of commerce and excepts from operation of the anti-trust laws, non-stock labor, agricultural, and horticultural associations not conducted for profit.

The following conclusions with reference to the new trust legislation may be drawn from the discussion presented in the present and preceding article.

[35] Sec. 12.

[36] Sec. 13. Under certain conditions.

1. The Trade Commission is a body with wide powers of investigation and a limited administrative authority.

2. Several of its investigatory powers have to a noticeable degree been previously exercised by either the Bureau of Corporations or the Department of Justice. But on the whole the investigatory authority of the commission is considerably greater than that possessed in the past by either or both of these other bodies.

3. The commission is given the powers of making recommendations to the Attorney General for the readjustment of the business of corporations violating the anti-trust acts and also of ascertaining and reporting appropriate decrees in equity suits brought by or under the Attorney General. But the exercise of these functions depends in the first case upon the application of the Attorney General and in the second case upon the reference of the suit by the courts to the commission. No such discretionary powers should have been given to either the Attorney General or the courts, but both these acts should have been made mandatory in all cases involving readjustments or decrees. In addition it should have been made mandatory upon the Attorney General to accept such recommendations as the commission might make for effecting the readjustment of any business. Nothing would have been lost by making these requirements, and the dignity and importance of the commission would have been increased.

4. The Trade Commission act gave the commission a most important administrative authority in providing that this body should prevent unfair methods of competition. The Clayton measure further extended this authority in giving it jurisdiction to enforce the prohibitions against holding corporations and interlocking directorates. It also gave it jurisdiction to prevent price discriminations and exclusive and tying arrangements. The authority to prevent price discriminations and exclusive arrangements, however, does not properly constitute any increase in the commission's powers since any sound construction of the unfair competition section of the Trade Commission act could scarcely fail to include these methods. While tying arrangements are also unfair it is at least doubtful, in view of the Dick decision, whether it would have been possible for the Trade Commission to have prevented them without the authority thus conferred. This provision, therefore, may be regarded as a wise precautionary measure.

5. The enforcement of the principal prohibitions of the Clayton

act and of the unfair competition section of the Trade Commission act is entrusted to the commission by an admirable method of procedure. The commission conducts a hearing and makes an order against a practice, a review of which may be had by the party against whom it is made in the Circuit Court of Appeals. If the order is not obeyed the commission applies to the same court for enforcement, and the jurisdiction of the court in both cases is exclusive and final.[37]

6. Unfortunately a concurrent jurisdiction has been vested in the district courts to enforce the prohibitions against price discriminations, exclusive and tying arrangements, holding corporations and interlocking directorates. It is extremely doubtful if this will serve any useful purpose. At the same time it is possible, if not probable, that it will affect adversely the prestige of the commission. It is also unfortunate in providing two different courts of final review upon these practices, *i.e.*: the Circuit Court of Appeals when the Trade Commission makes orders against these practices; the Supreme Court when a district court enjoins them.

7. The new laws rely primarily upon contempt proceedings and the penalties therefor in the matter of enforcing their prohibitions. The sufficiency of such arrangements must, I think, depend largely upon one's personal estimate. Sherman act experience indicates that the courts have been inclined in imposing sentence to take a very tolerant view of violations of that measure. If the same attitude is taken in imposing sentences for contempts of court in cases arising under the new laws, it may certainly be doubted if these arrangements are adequate.

8. The elimination of criminal penalties from several sections of the Clayton act and the lack of any such provisions as punishment for unfair methods of competition clearly point to civil rather than criminal procedure as the remedy to be invoked in cases of violations of the principal prohibitions of the new legislation. This again, coupled with the fact that the new laws provide for a Trade Commission with jurisdiction over their important prohibitions, points to a policy of administrative regulation of the trusts. This, I believe, is still true in spite of the concurrent jurisdiction provided for in Section 15 of the Clayton act. This section might readily be construed as merely indicating a reluctance to accept fully the principle of administrative regulation. Ulti-

[37] Subject to the exceptions stated under 6 below.

mately, unless the Trade Commission is abolished either directly or indirectly, this concurrent jurisdiction will probably be abolished or else rendered nugatory through the non-action of the officers of the Department of Justice.

9. The powers given to the Trade Commission of classifying corporations and prescribing the form of reports are pregnant with possibilities. Through these powers it would appear possible for the Trade Commission to determine with some correctness the relative economic efficiency of competition on the one hand and combination and monopoly on the other. Even if no such broad determination can be arrived at for industry in general we ought at least to be able to learn in what types and kinds of business the one or the other principle is the more efficient. In this way light will be shed upon the soundness of such measures as we have already taken for trust regulation and of those which we may take in the future.

10. The provisions of the new legislation in the direction of enabling individuals to better protect themselves against loss or damage by reason of violations or threatened violations of the anti-trust acts are commendable as is also the reënactment, now applied to violations of any of the anti-trust acts, of the threefold damage clause of the Sherman act.

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